No. 97-843

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AURELIA DAVIS, as next friend of LASHONDA D.,
Petitioner,

v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY TO BRIEF IN OPPOSITION

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1. Shortly after the Petition for Writ of Certiorari was filed in this case, the United States Court of Appeals for the Fourth Circuit decided a student-to-student sexual harassment case, *Brzonkala v. Virginia Polytechnic Institute and State University* ("VPI"), No. 96-1814, 1997 U.S. App. LEXIS 35970 (4th Cir. Dec. 23, 1997), which exacerbates the circuit splits identified in the petition. The plaintiff in *Brzonkala* alleged *inter alia* that two fellow students gang raped her in September of 1994, and that the university failed to impose meaningful punishment on

either of the assailants, despite finding one of them guilty. The Fourth Circuit reversed the district court's ruling that the plaintiff had failed to state a claim for a hostile environment under Title IX, holding that (1) Title IX requires a school to take prompt and adequate remedial action in response to student-to-student sexual harassment of which the school knew or should have known; and (2) Title VII principles apply to determine a school's liability for a hostile environment sexual harassment claim under Title IX.

2. The Fourth Circuit has now aligned itself with the Ninth Circuit in recognizing peer hostile environment sexual harassment as a violation of Title IX. Respondents erroneously claim that *Oona, R.S. v. McCaffrey*, 122 F.3d 1207 (9th Cir. 1997), did not reach student-to-student harassment. In *Oona*, the court found that the obligation to remedy teacher-to-student and peer sexual harassment was clearly established at the time of the alleged injury. *Id.* at 1210-11. Building on its earlier decision in *Doe v. Petaluma School District*, 54 F.3d 1447 (9th Cir. 1995), in which it stated that this Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), established a duty on the part of school officials to respond to student-to-student sexual harassment, the court in *Oona* specifically stated:

> We do not consider what steps school officials may reasonably be required to take to prevent harassment by fellow students, and hence do not consider the extent to which such action may differ from the action reasonably expected of employers to prevent harassment by fellow employees. *We hold only that the duty to take reasonable steps is clearly established.*

Oona, 122 F.3d at 1211 (emphasis added).

Notwithstanding Respondents' assertions, the fact that *Oona* focused on whether individual school officials were entitled to qualified immunity under 42 U.S.C. § 1983 in

no way undermines the court's holding that Title IX requires schools to take prompt and appropriate action to address student-to-student sexual harassment. Section 1983 merely provided a basis for holding the individuals liable for violating Title IX. In order to determine whether the individual defendants could be held liable, the court had to decide, as a legal matter, whether at the time of the alleged offenses, reasonable school officials should have known that the alleged conduct violated the plaintiff's rights under Title IX. The court concluded that after *Franklin*, school officials had a duty to remedy peer and teacher-student sexual harassment. *Id.* at 1209-11.

3. *Brzonkala* also intensifies the split over whether Title VII principles should guide courts in determining school liability for hostile environment claims under Title IX. The Fourth Circuit looked "to the extensive jurisprudence developed in the Title VII context" to "determin[e] whether an educational institution's handling of a known sexually hostile environment is actionable 'discrimination' under Title IX." *Brzonkala*, 1997 U.S. App. LEXIS 35970, at *18. The court held that a plaintiff asserting a hostile environment claim under Title IX must show: "1) that she [or he] belongs to a protected group; 2) that she [or he] was subject to unwelcome sexual harassment; 3) that the harassment was based on sex; 4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her [or his] education and create an abusive educational environment; and 5) that some basis for institutional liability has been established." *Id.* at *24-*25 (internal quotation marks omitted).

In holding that Title VII principles should guide its determination of a Title IX hostile environment sexual harassment claim, the Fourth Circuit joins the First, Second, Sixth, Eighth, and Ninth Circuits on this issue and aligns itself firmly against the Fifth, Seventh, and Eleventh Circuits.[1] The *Brzonkala* court noted that the

[1] The court relied on the same cases as does Petitioner to support the application of Title VII principles to the Title IX hostile envi-

Eleventh Circuit in this case followed *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006 (5th Cir. 1996), while the Ninth Circuit "flatly rejected the *Rowinsky* rationale." *Id.* at *22 n.6 (citing *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997) (en banc), and *Oona*, 122 F.3d at 1210).[2]

4. Respondents assert erroneously that the Eleventh Circuit never reached the merits of the issue of whether Title VII principles should apply to claims of student-to-student sexual harassment brought under Title IX. Opp'n at 4. However, the *Davis* en banc court specifically stated that Title VII principles did not apply to the Title IX case before it. The court stated:

> We decline appellant's invitation to use Title VII standards of liability to resolve this Title IX case. First, Title VII and Title IX are worded differently. . . .

ronment claim. *See Brzonkala*, 1997 U.S. App. LEXIS 35970, at *18-*19, *21-*22 (citing *Franklin*, 503 U.S. at 75; *Oona*, 122 F.3d at 1210; *Doe v. Claiborne County*, 103 F.3d 495, 515 (6th Cir. 1996); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 467-68 (8th Cir. 1996); *Seamons v. Snow*, 84 F.3d 1226, 1232 (10th Cir. 1996); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 540 (1st Cir. 1996); *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 248-51 (2d Cir. 1995); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 896 (1st Cir. 1988)).

[2] Contrary to Respondents' assertion, the decision below is even broader than that in *Rowinsky*. Opp'n at 5-6. The *Rowinsky* court held that a school *may* be liable for student-to-student sexual harassment under Title IX, but only where the school itself discriminates against the student by responding differently to sexual harassment complaints based on the gender of the complainant. 80 F.3d at 1016. In contrast, the Eleventh Circuit's holding forecloses even this avenue for liability. Specifically, the court held that schools are not liable under Title IX for peer sexual harassment because they did not receive notice that they could be held liable for this form of sex discrimination. *Davis*, 120 F.3d at 1401. As the dissent noted, this holding insulates federally funded educational institutions from liability for peer harassment in *all* cases, "no matter how egregious—or even criminal—the harassing discriminatory conduct may be, and no matter how cognizant of it supervisors may become." *Id.* at 1412 (Barkett, Hatchett, Kravitch and Henderson, JJ., dissenting).

> Second, Title VII was enacted under the far-reaching Commerce Clause and § 5 of the Fourteenth Amendment. Title IX was not, and consequently its reach is narrower.
>
> Third, the exposition of liability under Title VII depends upon agency principles. Agency principles are useless in discussing liability for student-student harassment under Title IX, because students are not agents of the school board. . . . In short, Title VII jurisprudence does not control the outcome of this case.

Id. at 1400 n.13 (citations omitted).

5. Respondents misconstrue other circuit-court decisions applying Title VII standards to Title IX claims. In *Murray v. New York University College of Dentistry*, 57 F.3d 243 (2d Cir. 1995), the court explicitly held that "in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII." *Id.* at 249. The court then discussed the constructive notice standard for employer liability applicable in situations of harassment by a co-worker or low-level supervior who does not rely on his authority to harass, and it cited cases regarding whether this standard should be extended in Title VII cases to situations of harassment by non-employees. Ultimately, the court found it "unnecessary to decide . . . *to what extent* we would apply a constructive-notice standard in cases under either Title VII or Title IX" because Murray's complaint failed to allege any type of notice. *Id.* at 250 (emphasis added). The Second Circuit confirmed its holding in *Murray* recently in *Kracunas v. Iona College*, 119 F.3d 80, 86 (2d Cir. 1997), in which the court held that application of Title VII standards to a Title IX hostile environment sexual harassment claim was appropriate.

Respondents also misapprehend the First Circuit's holdings on this issue, characterizing *Lipsett v. University of*

Puerto Rico, 864 F.2d 881 (1st Cir. 1988), as being strictly limited to the employment context. While *Lipsett* involved a mixed education-employment setting, the First Circuit has since made clear that its holding applies to the education setting as well. In *Brown v. Hot, Sexy, and Safer Products, Inc.*, the First Circuit applied Title VII principles to a Title IX claim alleging a hostile educational environment, citing *Lipsett* for support.[3] 68 F.3d at 539-41.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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[3] Respondents' argument that the action in *Lipsett* was limited to declaratory and injunctive relief is misleading, as *Lipsett* was decided before this Court's decision in *Franklin*. Opp'n at 9 (citing *Lipsett*, 864 F.2d at 884 n.3). Thus, the referenced statement in *Lipsett* is no longer good law. *See Franklin*, 503 U.S. at 73-76.